



LAW
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LEAD

SECURING COMMUNAL LAND RIGHTS TO ACHIEVE SUSTAINABLE DEVELOPMENT
IN SUB-SAHARAN AFRICA: CRITICAL ANALYSIS AND POLICY IMPLICATIONS

Ross Andrew Clarke

ARTICLE



VOLUME
5/2

LEAD Journal (Law, Environment and Development Journal)
is a peer-reviewed academic publication based in New Delhi and London and jointly managed by the
School of Law, School of Oriental and African Studies (SOAS) - University of London
and the International Environmental Law Research Centre (IELRC).

LEAD is published at www.lead-journal.org

ISSN 1746-5893

*The Managing Editor, LEAD Journal, c/o International Environmental Law Research Centre (IELRC), International Environment
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This document can be cited as

Ross Andrew Clarke, 'Securing Communal Land Rights to Achieve Sustainable Development in Sub-Saharan Africa: Critical Analysis and Policy Implications',
5/2 Law, Environment and Development Journal (2009), p. 130,
available at <http://www.lead-journal.org/content/09130.pdf>

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1

BACKGROUND

Land belongs to a vast family of which many are dead, few are living and countless members are still unborn' (Nigerian berder)¹

Communities across Sub-Saharan Africa increasingly have an officially recognised role managing communal land and local natural resources. This positive shift allows the resources that are vital for rural livelihoods and people's way of life to be managed by those that depend on them. Most importantly, it acknowledges the clear links between land tenure and how people relate to their environment. Studies across the developing world demonstrate how land degradation is heightened where tenure is unclear or not upheld.² Securing communal rights of access and usage is therefore crucial to the effectiveness of any scheme which empowers communities to manage communal land.

This article focuses on how to achieve sustainable management of the 'commons', areas that comprise common pool resources, including land, water and forests. It tracks recent trends that place communities forefront in local resource management, with particular focus on tenure security and efforts to strengthen rights of access and usage. Yet despite a policy shift that seeks to devolve management responsibility of communal property to the community-level, the expected results in terms of more sustainable resource exploitation and sounder environmental management have yet to be realised.

The central area of inquiry for this article is therefore the effectiveness of securing communal rights as a tool to achieve sustainable development and environmental protection. Analysis of the limited impact of existing policies is also undertaken. Given this approach, it is

necessary to examine land reform more generally and place communal land rights within this broader framework. An evaluation of current models of community-driven land and resource management is then undertaken with specific emphasis on the legal structures employed and how to best secure communal rights. Finally, a detailed case study of the *Gestion de Terroir* approach employed in Burkina Faso is used to highlight key policy considerations to strengthen the practical implementation of a communal tenure approach.

While the obstacles to implementation are immense, particularly the intensely political nature of land relations, this article argues that on a conceptual level greater emphasis must be placed on bridging statutory command-and-control regimes with community-based models. Focusing on the links between communal land tenure and environmental management, and effectively embedding community land management institutions within existing environmental governance offers a practical model to promote sustainable development.

1.1 Sustainable Development Law and Land Rights

Securing communal land rights seeks to achieve several objectives towards sustainable development: participation, empowerment, decentralisation, sustainable resource use and improved livelihoods. Yet land tenure – defined as 'the relationship, whether legally or customarily defined between people, as individuals or groups, with respect to land'³ – is noticeably absent from international legal instruments as a mainstream tool for achieving sustainable development. For example, while acknowledging the importance of participation and access to information for environmental protection, the 1992 Rio Declaration on Environment and Development makes no explicit mention of the role land tenure systems and property rights can play in achieving sustainable development. Further, key international instruments on the subject – the Rio Conventions and Agenda 21 – only canvass tenure in relation to forestry contexts or for vaguely defined 'indigenous communities'. So although the significance of land tenure is acknowledged in relation to indigenous and forest-dwelling people, it is rarely applied more generally

1 Quoted in C. Lane ed, *Custodians of the Commons: Pastoral Land Tenure in East and West Africa* (London: Earthscan, 1998).

2 Brigitte Thebaud., *Land Tenure, Environmental Degradation and Desertification in Africa: Some Thoughts Based on the Sahelian Example* (London: International Institute for Environment and Development, 1995) and Stephen Turner, *Sustainable Development: What's Land Got to Do with It?* (Bellville: Institute for Poverty, Land and Agrarian Studies, Policy Brief No. 2, 2001).

3 Food and Agriculture Organization, *Land Tenure and Rural Development* (Rome: Food and Agriculture Organization, FAO Land Tenure Studies No. 3, 2002).

across international law. Indeed, in mainstream debates over tenure systems and associated environmental impacts, the overwhelming focus is on private over communal property rights.

Despite the absence of a land tenure approach under international sustainable development law, practitioners have increasingly recognised the importance of community driven natural resource management. Legal discourse is therefore falling behind current best practice. Consequently, this article highlights how securing communal tenure can translate sustainable development law and principles into more practicable policies.

The need for practical approaches to achieve sustainable management of the commons could not come at a more crucial time. Projected population growth, increasing demand on resources and a trend towards privatisation of communal land across Sub-Saharan Africa are placing increasing pressure on the commons. The challenge for legal discourse is therefore to provide frameworks and policies that are not only theoretically sound but can be adapted for localised contexts, be successfully operationalised and can then achieve an impact at scale.

2 COMMUNAL LAND RIGHTS AND NATURAL RESOURCES

2.1 Definitions and Concepts

2.1.1 *The Commons, Communal Land Rights and Customary Law*

Secure rights to land and property have long been considered an essential public good and a basic legal foundation of any capitalist system. From Aristotle to Adam Smith (1776),⁴ and most recently to Hernando de Soto (2000)⁵ the role of property rights in shaping economic decision-making and increasing productivity

has been recognised. While the focus has been overwhelming on the economic gains that secure individual rights potentially provide, the importance of securing communal rights to land, particularly in sub-Saharan Africa, is gaining increasing attention. Given the expansive literature on security of tenure and economic incentives, this article focuses on the environmental benefits that secure communal tenure can provide. Although it is acknowledged that economic growth is a fundamental tenet of sustainable development, environmental and sustainability considerations will be prioritised.

Communal rights over the commons – common pool resources such as pastoral land, forests, fallow fields, inland waterways and wetlands – are an essential aspect of many rural livelihoods, allow access to and use of resources, and provide a foundation for many communities' way of life. As communal tenure systems (defined below) generally encompass land and the resources directly linked to it, a general definition of the commons is used.⁶ While it is acknowledged that the specific nature of land and related resources, seasonality and accessibility have significant bearing on tenure arrangements, a general definition is preferred in order to draw broad theoretical analysis on the relationship between common property resources, tenure and environmental management.

Communal tenure arrangements across Sub-Saharan Africa are characterised by their great diversity and complexity.⁷ Yet a common thread that links these systems together is that tenure is a social institution in which relationships between individuals and groups govern rights, rules and values related to land use.⁸ Tenure over common resources involves a 'bundle of rights' encompassing access, exclusion and the right to use and extract resources. It also generally includes management rights regarding allocation and transfer.⁹

6 See Thebaud, note 2 above.

7 H. Ouedraogo and C. Toulmin, *Land Tenure, Poverty and Sustainable Development in West Africa: A Regional Overview* (Edinburgh: International Institute for Environment and Development, 1999).

8 L. Birgegard, *Natural Resource Tenure: A Review of Issues and Experiences with Emphasis on Sub-Saharan Africa* (Uppsala: International Rural Development Centre, Rural Development Studies No. 3, 1993).

9 R. Palmer, *Literature Review of Governance and Secure Access to Land* (Cairo: North South Consultants Exchange, 2007).

4 See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London: Strahan and Cadell, 1776).

5 See Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

There may further be a hierarchy of interlocking rights over a single piece of communal land. For example, a customary authority may exercise broad communal rights while groups or individual users may be granted specific rights of access and use.¹⁰ Temporary access may also be granted to 'outsiders' based on negotiation. The inherent complexity and diversity regarding not only user groups but also communal resources is a constant factor that shapes tenure over the commons.

An important distinction is the dichotomy between *de facto* and *de jure* rights to the commons. While according to formal legal instruments the state generally has primary ownership of the commons across Sub-Saharan Africa, *de facto* rights originate from users and generally do not receive state recognition. Although *de facto* rights are contained within a group-based system, individual access rights generally co-exist within the broader communal framework.¹¹ Importantly, for the majority of Sub-Saharan African communities, these *de facto* rights are grounded in customary norms, enforced by indigenous legal systems and may receive state recognition only to the extent customary law is recognised. Any analysis of tenure arrangements over the commons therefore requires engagement with customary, indigenous law or non-state law.

Customary law has been the subject of increasing scholarship in recent decades. It can be defined as legal rules and processes that have become an intrinsic part of accepted legal conduct and arise from social practices rather than positive law. For Sub-Saharan contexts it is usually based on indigenous norms and value systems. Today there is now widespread recognition that customary principles and dispute resolution processes represent the most relevant legal framework for rural communities in Sub-Saharan Africa.¹² Current literature emphasises the dynamic, adaptive and flexible capacity of customary legal systems, dispelling widely held conceptions regarding their static, 'traditional' nature.¹³

Indeed, customary law and in particular customary land tenure, has been profoundly shaped by numerous processes: population growth and movement, urbanisation, livelihood diversification and globalisation.¹⁴

As a result, the very term and concept of customary law is contested.¹⁵ Critics point to it as a colonial construct that locks indigenous legal systems in time and denies the dynamic, responsive nature of local legal systems and institutions.¹⁶ Although these debates hold weight, customary law continues to provide a valid conceptual framework and will be used throughout this paper. A further distinction between communal tenure and customary law is necessary. While customary law governs tenure over the commons in the majority of rural Sub-Saharan Africa, the distinction between communal tenure (community rights to common property and resources) and customary law (the indigenous norms and institutions that govern access and use) is an important one.

Despite a trend towards increasing formalisation of land tenure, particularly in urban and peri-urban areas, customary land management institutions are still the most important authority regulating communal land administration.¹⁷ Regardless of this reality, until recently customary authorities have been severely marginalised in land reform policies, primarily due to the centrist nature of reform and the presumed insecurity of tenure they afford. In a positive shift, there is now greater recognition that communal tenure and customary land institutions must be an integral part of land administration.

2.1.2 Improving Security of Tenure

Land tenure, particularly in Sub-Saharan Africa, has long remained a controversial, politically charged and potentially destabilising issue. Due to the colonial legacy of legal pluralism, mass expropriation of land, marginalisation of indigenous tenure systems and the

10 See Ouedraogo and Toulmin, note 7 above.

11 E. Shlager and E. Ostrom, 'Property-Rights Regimes and Natural Resources: A Conceptual Analysis', 68/3 *Land Economics* 249 (1992).

12 L. Cotula, Legal Empowerment for Local Resource Control: Securing Local Resource Rights within Foreign Investment Projects in Africa (London: International Institute for Environment and Development, 2007).

13 J. Bruce and S. Migot-Adholla eds, *Searching For Land Tenure Security in Africa* (Dubuque: Kendall Hunt, 1993).

14 L. Cotula ed, *Changes in 'Customary' Land Tenure Systems in Africa* (London: International Institute for Environment and Development, 2007).

15 M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Kampala: Fountain Publishers, 1996).

16 P. Veit, *Africa's Valuable Assets - A Reader in Natural Resource Management* (Washington: World Resources Institute, 1998).

17 See Cotula ed, note 14 above.

resulting uncertainty over land tenure, Sub-Saharan African governments have attempted sweeping land administration reforms. Forefront in these policies has been the formalisation of individual title through surveying and registration as a means to improve security of tenure, particularly for the rural poor. Influenced by economic arguments regarding the incentives secure property rights create for long-term investment, access to capital, and growth, these reforms have dealt with tenure security through the narrow confines of formalisation.¹⁸

Yet large-scale national reforms have been widely criticised. In most cases effective implementation has proved unachievable or has actually resulted in increased tenure *insecurity*.¹⁹ Indeed, despite decades of reform towards formalisation, it has been estimated that only 2-10 per cent of rural land across the continent has been formally titled.²⁰ Numerous studies have demonstrated the negative consequences that titling processes can cause. Meizen-Dick et al demonstrate the risks inherent in titling policies, particularly for secondary rights users, due to elite capture and increasing inequality in land ownership.²¹ Nyamu-Mesembri further highlights the failure of formal title to increase access to credit in rural Africa, despite assumptions to the contrary.²²

As a result, current literature on land tenure reform emphasises the need to build on existing indigenous practices, empower local communities, avoid one-size-fits-all approaches, and appreciate the political and social dynamics inherent in land relations.²³ Increasing security of tenure in a rural African context is therefore a socio-political process of which formal law is just one aspect.²⁴

Despite the ineffectiveness of land reform policies in making inroads into tenure insecurity, it remains a conceptually appealing approach. Secure land rights puts incentives in place to encourage sustainable exploitation of resources and promotes investments in conservation. As rights are officially protected, rights holders are more likely to take a long-term view given the benefits of investment or sustainable use will accrue to themselves and their successors. The same applies to securing communal rights over the commons, however it has the added benefit of providing a basis for community empowerment and participation in environmental decision-making.

Throughout this article, strengthening communal tenure to the commons is considered more than formal registration. Rather it can range from state recognition of customary rights, strengthening of community-based land management authorities, to increased oversight of local land administration. The overarching objective is to provide all users with increased recognition and protection of their rights. Given the social and political nature of land relations, any attempt to strengthen security of tenure must therefore avoid general prescriptions and be highly context-specific.

2.2 Shifting Policies: Empowering Local Communities to Administer Land and Manage Natural Resources

During the colonial period, common pool resources were generally regarded as having no owners and at risk of mismanagement. As a result, despite well-established indigenous tenure and use arrangements, they were appropriated by the colonial state and made subject to centralised management.²⁵ Post-independence, government policy favoured a centralised, top-down approach as it was considered most effective in ensuring productive exploitation. Local users were generally excluded from decision-making and centralised land legislation severely restricted access and use. Yet a lack of state capacity and enforcement made centralised efforts to manage the commons ineffective and generally led to *de facto* open access regimes (Hilhorst, 1999).²⁶

18 C. Nyamu-Musembi, *Breathing Life into Dead Theories about Property Rights: de Soto and Land Relations in Rural Africa* (Brighton: Institute of Development Studies, Working Paper 272, 2006).

19 A. Manji, 'Land Reform in the Shadow of the State: The Implementation of New Land Laws in Sub-Saharan Africa', 22/3 *Third World Quarterly* 327 (2001).

20 K. Deininger, *Land Policies for Growth and Poverty Reduction* (Washington: World Bank, 2003).

21 R. Meizen-Dick, M. Di Gregorio and S. Dohrn, *Decentralization, Pro-Poor Land Policies, and Democratic Governance* (Washington: CGIAR Systemwide Program on Collective Action and Property Rights (CAPRI), Working Paper No. 80, 2008).

22 See Nyamu-Mesembri, note 18 above.

23 See Cotula, note 12 above.

24 See Lane, note 1 above.

25 T. Hilhorst and N. Aarnink, *Co-managing the Commons: Setting the Stage in Mali and Zambia*, (Amsterdam: Royal Tropical Institute, 1999).

26 *Ibid.*

Resource depletion and environmental degradation were common results.

Hardin's Tragedy of the Commons (1968)²⁷ has cast a shadow over the tenure of communal property for most of the past fifty years. Hardin argued that as population increases, unclear ownership of common pool resources will inevitably result in overexploitation and degradation as each user acts in self-interest to maximise their personal benefit. The prescribed solution was land reform to transform communal tenure into formal, individualised ownership. Hardin's work has been subject to intense criticism, primarily due to his failure to distinguish between resources with open access or common property regimes²⁸ Feeny (1992) has argued that common property regimes, including those based around customary systems, have managed to be sustainable even when resource use intensifies. Open access regimes, on the other hand, which have no rules governing access and use increase the risk of environmental degradation unless users respond to the problem.

Since the 1980s there has been increasing recognition that despite statutory reforms to limit their authority, in many cases customary authorities remain effective at managing access to communal land and regulating sustainable exploitation.²⁹ Further, these existing institutions can be strengthened to deal with the contemporary pressures of increasing privatisation, growing resource demand and land degradation. This growing interest in customary management systems, combined with governance trends towards decentralisation, citizen participation and the prominence of sustainable development discourse, have laid the foundation for an officially recognised role for communities in managing the commons.

Policy regarding community management of the commons has in recent times been dominated by the community-based natural resource management (CBNRM) approach. While primarily a technical (as opposed to legal) methodology, CBNRM recognises the importance of secure rights of access and exclusion as a basic precondition of effective management. CBNRM

further requires a well-defined social group, clear regulations that limit levels of exploitation and a capacity to monitor and enforce the rules.³⁰ Rather than a prescriptive policy, CBNRM is more a model that requires modification due to the nature of the particular resource, the technical capability of government authorities, local power dynamics and external interests regarding extraction.³¹ Despite the need for context specificity, CBNRM is today widely considered the most effective strategy to balance the needs of sustainable exploitation and environmental management.

Current policy regarding tenure of the commons appears to have learnt the mistakes of centralised titling programs. Economic justifications for privatisation based on tragedy of the commons arguments have by and large been discredited allowing greater recognition of local tenure practices. The ideological assumption that communal tenure is inherently insecure has also been dismissed, facilitating the phasing out of policies that aim to achieve either full individual ownership or complete state control.³² Importantly, the limitations of reform primarily based on national legislation have finally been recognised. There is now greater appreciation of how centralised statutory-based reform can reduce tenure security, can result in minimal oversight and enforcement, and is incapable of reflecting local conditions.³³

From an environmental perspective, the links between tenure insecurity of the commons and land degradation are also increasingly clear. Wherever property rights are inconsistent, unresponsive or unenforced, environmental problems can either be created or exacerbated.³⁴ The flexibility of local tenure practices

27 G. Hardin, 'The Tragedy of the Commons', 162/3859 *Science* 1243 (1969).

28 See Hilhorst and Aarnink, note 25 above.

29 See Lane ed, note 1 above.

30 International Institute for Environment and Development, *Land Tenure and Resource Access in West Africa: Issues and Opportunities for the Next Twenty Five Years* (London: International Institute for Environment and Development, 1999).

31 M. Turner, *Ecological Complexity and the Management of Common Property Resources* (Cambridge: Land Tenure Institute, Tenure Brief No. 5, 2007).

32 G. Hesselting, 'Legal and Institutional Incentives for Local Environmental Management', 23/1 *Public Administration and Development* (1996), available at https://openaccess.leidenuniv.nl/bitstream/1887/9366/1/ASC_1247243_032.pdf.

33 *Ibid.*

34 See Hilhorst and Aarnink, note 25 above.

to adapt to changing environmental conditions are therefore emphasised as an appropriate response.

Thus current trends regarding management of the commons emphasise the devolution of management responsibility to the community level and a bottom-up, sociological approach to developing regulations to govern access and use. Indeed the principle of local management of land and resources is today almost universally accepted (IIED 2002). This trend must further be placed within the broader context of administrative decentralisation which localises decision-making and empowers citizens to manage their own affairs.³⁵ Yet while the principle of localised management is well-established, significant debate exists over the most effective legal structures to represent communities and the extent to which the state should be involved in formulating rules over resource use and monitoring enforcement.

3

CURRENT PRACTICE REGARDING MANAGEMENT OF THE COMMONS

This section provides a survey of existing models regarding management of the commons, focusing on the legal embodiment of the 'community' and its tenure over land or resources. The intention is to provide an overview of various models, with a more detailed analysis of benefits and disadvantages, as well as a detailed case study, provided in later sections.

3.1 Community as a Corporate Legal Entity

A common approach taken across Sub-Saharan Africa has been for communities to establish corporate entities that are capable of holding collective land rights. In such a model, a community representative body is established, possibly through deed or under statutory corporation

law, which then exercises management authority over communal land or resources. While ensuring accountable and meaningful community representation provides serious challenges (discussed in more detail below), such a structure does allow a representative body to develop and oversee localised rules for resource use. Ideally, all user groups and prominent stakeholders will have a voice in the development of the usage framework. Indeed it has been noted that on a practical level, the pre-agreement consultation and negotiation process may be more important than the actual agreement itself.³⁶ Given the prominent role the local entity will play directly managing the commons under this model, ensuring clear and effective corporate governance rules that cover the selection and dismissal of board members, decision-making processes and accountability mechanisms are crucially important.

A high-profile and much criticised scheme that takes this approach is South Africa's Communal Land Rights Act (CLRA) of 2004. Under article 3, a community – defined as a 'group of persons whose rights to land are derived from shared rules determining access to land held in common' – can acquire 'juristic' personality once it has registered its rules to regulate land access, use and administration. Registration creates a community-level Land Administration Committee, which can either be established anew or have its functions performed by an existing customary institution. This process provides the community with formal rights and obligations over communal land. Land Rights Boards, established at the provincial level, provide oversight and ensure compliance with the act and other laws. Most criticism levelled at the Act has focused on the empowerment of unaccountable customary authorities, the ineffectiveness of gender sensitivity provisions and the priority afforded formal registration of communal rights.³⁷

Similar in approach is the establishment of a corporate entity that holds lands rights in trust for community members. This approach has been utilised in south eastern Zimbabwe where 17 household heads formed a

³⁵ P. McAuslan, *A Narrative on Land Reform in Uganda* (Cambridge: Lincoln Institute of Land Policy Conference Paper, 2003).

³⁶ B. Cousins, 'Tenure and Common Property Resources in Africa' in International Institute for Environment and Development, C. Toulmin and J. Quan eds, *Evolving Land Rights, Policy and Tenure in Africa* (London: IIED, 2000).

³⁷ S. Kariuki, *Failing to Learn from Failed Programmes? South Africa's Communal Land Rights Act* (Witwatersrand: University of the Witwatersrand, ASC Working Paper, 2004).

land management association through a deed of trust.³⁸ The deed outlined the trust's rules and objectives and was filed before a public notary. Once the community had legal standing, it was capable of engaging directly with government authorities and the private sector to advocate its position and to independently raise funds. Association members received training on how to manage the trust and natural resource management. Most importantly, the community's legal status allowed them to negotiate directly with the Rural District Council, the body with legal authority to manage the state land most rural communities live on.³⁹ As a result, the community trust achieved management authority over communal land, with district authorities maintaining an oversight role. While the establishment of the trust was merely the first step towards community empowerment over land affairs, it did facilitate localised and more participatory land management.

Whether by trust or incorporation, establishing a legal identity does not have any bearing on a community's rights to land. It does, however, create a legal structure which may then be capable of exercising communal rights. Important in the analysis of any such model is the extent of the rights that the community entity is actually granted. South Africa's CLRA envisions the Minister for Land Affairs making determinations on land boundaries and community rights over land. Although a communal land plan and rules to regulate land use must be finalised and registered, once this has occurred the community-level committee has full rights to administer the land (subject to existing planning laws) and may even grant freehold title to individuals if it sees fit. Assuming communities can navigate the formal registration process, the land is designated communal rather than state land, which includes full rights of land management and the authority to exercise all powers previously held by the Ministry of Land Affairs. Clearly the extent to which community representation results in a strong proprietary interest affects how meaningful community 'ownership' will be. Other models do not grant such extensive powers.

38 M. Dhlwayo, 'Helping Communities Gain Recognition as Legal Entities: The Experience of the Chibhememe Earth Healing Association in Zimbabwe', in L. Cotula and P. Mathieu eds, *Legal Empowerment in Practice: Using Legal Tools to Secure Land Rights in Africa* (London: International Institute for Environment and Development, 2008).

39 *Ibid.*

3.2 Decentralisation: The Community as the Lowest Level of Administrative Government

This model involves the transfer of executive competence over land tenure to the local level.⁴⁰ While land will usually remain vested in the state, community representatives will control and regulate use. In most circumstances, guidelines are formulated at a national level and implemented at a district and local level, subject to modification for local conditions. Central and district governments maintain a supervisory role. Important issues include the methodology used to select community representatives, the relationship the community organisation has with customary authorities, and ensuring clear division of responsibilities between community-level institutions and authorities higher in the administrative hierarchy.⁴¹ Accountability mechanisms must also be put in place to minimise wastage, protect against corruption and prevent abuse of power.

The most prominent scheme along these lines is the *Gestion de Terroirs* (GT) or Village Land Management model. Implemented across francophone West Africa, the GT approach first arose in response to environmental degradation in the Sahel region and seeks to transfer control and access to natural resources from the central government to local communities. This approach, explored through a detailed case study below, is not limited to reforming land tenure but is a holistic approach to rural development and building sustainable livelihoods. Key elements of GT are community led natural resource management, empowerment of local institutions, capacity building, community decision-making and security of communal tenure.⁴² By redefining community rights and responsibilities in relation to land, GT seeks to use secure communal land tenure as a foundation for achieving broader development objectives.

The current trend towards administrative decentralisation cuts across all schemes aimed at securing communal tenure of the commons and indeed almost

40 See Hesseling, note 32 above.

41 See Meizen-Dick et al, note 21 above.

42 See International Institute for Environment and Development, note 30 above.

all areas of contemporary governance. This is due to a substantial body of research which demonstrates that land reform strategies are most effective when based on established local practices and managed by existing local institutions.⁴³ While this trend appears unlikely to change in the near future, significant challenges remain to link community level authorities efficiently and effectively into the broader governance framework.

3.3 Custodianship and Stewardship

Under a custodianship model, community land is generally still vested in the state, however an individual or community entity is designated custodian and regulates user rights. The custodian usually has powers of exclusion and develops rules of access and exploitation.⁴⁴ The concept of custodianship is far more meaningful when analysed in a customary law context rather than through Western notions of ownership. While generalisations should be avoided given the vast diversity of customary land tenure across Sub-Saharan Africa, a common theme is the status of land as something that is not owned but is held in trust for future generations.⁴⁵ User rights are therefore generally limited to the extent exploitation does not cause irreversible damage or impact on future use. Significantly, such a conception of land and natural resources mirrors the focus on intergenerational equity within the definition of sustainable development under international law. It further emphasises the responsibilities that come with land administration, while Western conceptions of ownership overwhelmingly prioritise rights.

The concept of custodianship has been criticised as it does not amount to formal ownership and therefore can perpetuate structural inequalities for indigenous communities.⁴⁶ Without the ability to fully control land and resources, it is argued that communities cannot determine what activities add value, cannot negotiate directly with the private sector and are therefore limited

in receiving direct benefit from external exploitation of local resources. Mayoral-Phillips argues this reinforces colonial-era policies as it fails to recognise that customary authorities have administered communal land responsibly and sustainably for decades.⁴⁷ Yet incorporating custodianship into a formal statutory system also has its negative consequences. The concept of freehold ownership sits uneasily with customary notions of custodianship and indeed may even be incompatible. The challenge is therefore to achieve official recognition and security of tenure for custodians of communal land while not making such rights subordinate to that of either state or individual ownership.

3.4 Co-management and CBNRM

Similar to custodianship but based more on a contractual arrangement is co-management. Often utilised as part of a CBNRM project, co-management generally involves negotiated agreements between local users, stakeholders and government over resource use and access. This facilitates user participation but still allows localised land management to occur within existing administrative and legal frameworks.⁴⁸ Accordingly, co-management can balance state-level priorities of efficiency and equity against local concerns for self-governance and participatory decision-making. A key objective of a co-management approach is the participatory negotiation of local management regulations. Direct user involvement in negotiations increases the legitimacy of rules and leads to better compliance. Through such an agreement, incentives towards sustainable management can be put in place and the negative environmental impacts of open access regimes can be avoided.⁴⁹

In Mali, local management contracts are increasingly part of the land administration landscape. A common scenario involves six villages negotiating an agreement concerning management over communal forest and pasture.⁵⁰ Experience demonstrates that the negotiating process is central to management outcomes and may take several years. In this case, delays were experienced due to difficulties in convincing villagers to limit their levels of resource exploitation, sanctions proved difficult

43 G. Sheperd, *Managing Africa's Tropical Dry Forests: A Review of Indigenous Methods* (London: Overseas Development Institute, 1992) and R. Pardo, 'Back to the Future: Nepal's New Forestry Legislation', 91/6 *Journal of Forestry* 22 (1993).

44 See Lane ed, note 1 above.

45 *Ibid.*

46 A. Mayoral-Phillips, *Is Custodianship of Wildlife Resources in the Commons the Only Way Forward?* (London: International Institute for Environment and Development, 2002).

47 *Ibid.*

48 See Hilhorst and Aarnink, note 25 above.

49 *Ibid.*

50 See Hesselting, note 32 above.

to agree upon, and local land management authorities resisted the change.⁵¹

Current co-management practice favours basing community rights to land administration on a contractual rather than a proprietary interest. This raises questions regarding the effect state ownership of land has on a community's contractual right to control use and access. Contracts are more easily broken or amended resulting in less secure rights for communities and weaker incentives to invest over the long-term.⁵² Conversely, a contractual approach offers significant flexibility. The rights and obligations of numerous parties can be detailed in the contract, while under proprietary regimes one group generally controls access. Contract duration can further be calibrated to reflect rapidly changing circumstances and access to the resource can be made contingent upon the fulfilment of contractual obligations.⁵³ Finally, agreements can more readily be tailored to suit local conditions and government oversight can ensure consistency with regional and national law.

While the flexibility advantages of a co-management approach are clear, additional research is needed regarding the negative consequences of basing localised land administration solely on contractual rights, rather than on more secure proprietary rights. Given the significant research attesting to the importance of security of tenure in achieving long-term investment in a resource, improving sustainable management, and reducing land degradation, strong justification exists to base localised land use regulations on proprietary over contractual rights.⁵⁴ It should further be noted that the two approaches can potentially co-exist. For example, a community legal entity can have full title over communal land but can then still negotiate use regulations based on a contractual arrangement with local users.

3.5 Current Best Practice

A variety of legal strategies are therefore being employed across Sub-Saharan Africa to simultaneously improve communal tenure security, land administration and local environmental management. These range from statutory

reform, decentralised management structures, custodianship arrangements to local co-management agreements. Important to note is that these models are not mutually exclusive. The best option will most likely draw on all models and be tailored to fit local conditions.⁵⁵

An example of a hybrid approach comes from the Jinja Wetlands in Uganda. As explained by Wacker and Wolf (2008), a collective of local wetland users jointly developed a Bye-Law to establish a co-management system to regulate access and use of the wetland. National wetland legislation enabled local authorities to regulate wetland use, and a Bye-Law was passed as a municipal-level regulation. This formally established the position of Wetland Custodian, with the Custodian appointed by the local council. The Wetland Custodian was authorised to implement the regulations on wetland use, ensure the overall sustainability of wetland resources and obtain a share of licence fees. The Jinja approach arose from extensive participatory research, combines elements of decentralisation and co-management, and importantly built upon the local customary legal tradition of custodianship.

Yet one common, influential factor across all models is the extent to which the community has secure tenure over the land. While this is highly context specific, proprietary interests afford greater security than contractual arrangements, however also result in decreased flexibility. Further, the exclusive control generally granted by a proprietary interest, combined with clear and legitimate rules of resource exploitation, provides an effective and practical model to achieve sustainable land and resource management.⁵⁶

Current best practice therefore favours communal tenure arrangements that are decentralised, participatory and based on community empowerment.⁵⁷ Best case scenarios occur when formal legal recognition is provided for existing, locally recognised communal tenure, resulting in increased tenure security. While such regimes will likely be most effective when based on customary norms and

⁵¹ *Ibid.*

⁵² See Ouedraogo and Toulmin, note 7 above.

⁵³ See Hesselning, note 32 above.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ International Institute for Environment and Development (IIED), *Making Land Rights More Secure: International Workshop for Researchers and Policy Makers* (London: International Institute for Environment and Development, 2002).

⁵⁷ See Cotula, note 12 above.

institutions, this is not necessarily the case.⁵⁸ Although there appears widespread consensus that land and resource management should be based on secure communal tenure and devolved to the community level, the extent to which these local structures should be integrated into existing regulatory structures generates debate. This is a theme that will be addressed in detail below.

Crucial to achieving the potential benefits of community-level management of the commons is the strategies adopted to secure communal tenure. As discussed previously, land tenure in rural Sub-Saharan Africa is above all a social institution that statutory law may influence but cannot dictate. Thus increasing security of tenure can best be achieved not through a grant of formal title but through the recognition or documentation of existing communal rights.⁵⁹ While the process may vary, the objective is clear: end the structural legal insecurity that has resulted in rural communities from unclear or non-existent recognition of communal tenure. If communal tenure can be secured, this will have important flow on benefits in terms of improved land and resource management. While offering significant potential, there are also several possible negative effects that warrant detailed analysis.

4 ANALYSIS OF SECURING COMMUNAL LAND RIGHTS TO ACHIEVE SUSTAINABLE DEVELOPMENT

4.1 Advantages

4.1.1 *Incentives for Efficiency, Sustainable Use and Environmental Protection*

The main justification for secure property rights has traditionally been the economic incentives that result from long-term, secure ownership. Ownership – in

particular rights of alienation and exclusion – creates incentives to make long-term investments allowing for increased productivity and more efficient use of resources.⁶⁰ This simple economic argument has been a central justification of all major land titling projects. Yet regarding communal resources, does it still ring true?

It is true that a community body with legal standing and secure rights to communal property does have the same incentive as individuals to invest over the long-term. Yet collective action problems present obstacles in terms of agreeing what investment may be necessary. However, although such a theory may be logical in the abstract, in practice in relation to a common resource such as land from which firewood is gathered, it is far from persuasive. The vast majority of the commons in sub-Saharan Africa require no or minimal capital investment. Indeed part of their importance and longevity is that given effective management, pasture, wetlands or forests, may be entirely renewable without capital inputs.⁶¹ Imposing a strictly economic model on a reality that is vastly different from the western economies that gave rise to the theory can generate perverse results. An apt example is the tenure insecurity that many rural poor were subject to following formal registration of title.

Yet what increased security of communal tenure does provide is incentives for more sustainable use and conservation, particularly in a rural African context. If community users have increased tenure security over the long-term there is significant incentive to ensure resources are not degraded. As each community member has an interest in ongoing use, and given the social nature of customary tenure generally promotes preserving the resource for future generations, certainty as to rights of access and the ability to exclude incentivises sustainable exploitation by all those that derive benefit.⁶² Conversely, where tenure is not clear, users have little incentive for sustainable management of the resource base as any conservation efforts could be wasted if their access to the land is withdrawn.⁶³

Where communal tenure is secure, environmentally harmful projects are less likely to be implemented. As

58 P. Delville, 'Changes in Customary Land Management Institutions', in L. Cotula ed., *Changes in Customary Land Tenure in Africa* (London: International Institute for Environment and Development, 2007).

59 See International Institute for Environment and Development, note 30 above.

60 See Shlager and Ostrom, note 11 above.

61 C. Toulmin, and J. Quan, eds, *Evolving Land Rights, Policy and Tenure in Africa* (London: DFID/IIED/NRI, 2000).

62 See Turner, note 2 above.

63 See Ouedraogo and Toulmin, note 7 above.

community members will experience first-hand the negative environmental consequences and the community's most valuable asset may be irreparably degraded, approval of dangerous projects is less likely. This is especially the case in comparison to central government policies which would most likely favour export-driven economic growth at the expense of local environmental damage. Under communal tenure therefore, long-term environmental impacts, public health consequences and the effect of a project on other livelihoods will be more readily taken into account. Experience also shows that community driven management results in sounder environmental outcomes.⁶⁴ It should be reiterated, however, that prioritising profit over environmental protection is also possible under community resource management. For example, in times of crisis or contexts of low social capital, some community members may prioritise short-term, high yield profits over long-term sustainable use.⁶⁵ Yet even so, strengthening communal tenure puts the correct incentives in place to mitigate such scenarios.

Clearly such a framework cannot guarantee that sustainable management will be achieved, however the incentives it creates offers far more hope of success than the de facto open access regimes that arise where central government regulation has proved ineffective. Furthermore, the participation and community empowerment that generally results from securing communal tenure encourages collective action to manage vital natural resources and local environments in a sound manner. Of course this cannot be expected to occur in every context. In circumstances of low social capital and where there are significant barriers to collective action, securing communal rights to the commons may have minimal effect.⁶⁶

On an implementation level, a focus on securing communal over individual title does have significant efficiency benefits. Simply, focusing policy on communal over individual land rights is quicker and more efficient as there are significantly less parcels of land to deal with. As individual titling projects have proved notoriously difficult to implement, such a consideration should not be dismissed.

4.1.2 Participation

A key procedural right that forms part of sustainable development discourse is participation in environmental decision-making. Principle 10 of the Rio Declaration stresses that 'environmental issues are best handled with participation of all concerned citizens'. Increasing security of communal tenure can achieve meaningful participation as community members, rather than merely participating through consultation, can actually lead environmental decision-making.⁶⁷ By establishing a community representative body with legal standing that has a proprietary interest in communal land, participation is transformed from the right to be heard to the right to be actively involved. Indeed it can be argued that without an officially recognised interest in the land or resource in question, even the best facilitated participatory process can result in community input being sidelined or acknowledged but not acted upon. All too often community consultation is conducted to provide the appearance of participation when policies are pre-determined by government authorities. Securing communal tenure provides a concrete response to this.

The most authoritative and comprehensive description of environmental procedural rights comes from the 1998 Aarhus Convention on the rights of access to information, public participation in decision-making, and access to justice in environmental matters. Negotiated under the auspices of the UN Economic Commission for Europe to implement Principle 10 of the Rio Declaration, the Aarhus Convention is also open for signature by all states. It further suggests a future focus on procedural rights and environmental democracy under international environmental law.⁶⁸ The Convention provides a lengthy description of how states should inform concerned citizens of upcoming environmental decisions, facilitate citizen participation in decision-making and provide mechanisms to hold states accountable when these rights are breached. The Convention states that authorities must take 'appropriate provisions' towards participation, take 'due account' of public statements and provide written, publicly accessible reasons for the particular decision taken. These vaguely worded provisions provide minimal

⁶⁴ See Turner, note 31 above.

⁶⁵ See Hesseling, note 32 above.

⁶⁶ See Hillhorst and Aarnink, note 25 above.

⁶⁷ See Turner, note 2 above.

⁶⁸ L. Siegle, 'Procedural Rights: Inclusion in Decision-Making Processes Relating to Land and Natural Resources', in Cotula, and Mathieu eds, note 38 above.

guarantees that community participation will actually shape environmental decisions. Empowering local communities through secure communal land rights, however, makes participation a necessity as any interested party must negotiate with and seek approval from the community group.

4.1.3 Decentralisation

All models to secure communal land tenure involve decentralisation in some shape or form. This usually occurs through the devolution of powers and responsibilities over communal land to those who depend on the resources. It also generally occurs concurrently with broader administrative decentralisation policies. The objective is to utilise local knowledge to deal with local issues and make decision-making more responsive.⁶⁹ In this regard, the principle of subsidiarity – management functions should be ascribed to the lowest possible level of administrative decision-making with higher levels only taking on what lower levels are manifestly unable to handle – is now a guiding principle in natural resource management.⁷⁰ This approach aims to improve environmental management as local residents have a greater stake and increased incentive to conserve their local environment.

Decentralisation should not be seen as panacea: it presents dangers as well as opportunities. It has potential to both entrench local elites and also to achieve more effective community-level service provision.⁷¹ The optimal level of decentralisation is a further complicating matter with conflicting views coming from different levels in the administrative hierarchy. Thus land administrators often apply the principle of subsidiarity when it strengthens their autonomy but are reluctant to apply it when it results in additional devolution of power to communities.⁷²

The dual trends of administrative decentralisation and decentralised management of communal land are an important consideration. While there are significant synergies between the two processes, research conducted

by IIED suggests that local government is less effective than community land councils at managing communal land.⁷³ While elected local officials gain legitimacy as representatives of the state, this legitimacy does not usually extend to land affairs; a field where customary authorities are far more influential. Placing land management under the responsibility of local government also adds another institution into an already uncertain, overcrowded institutional context and can increase the politicisation of a highly politicised issue.⁷⁴

Finally, a decentralised model also offers efficiency benefits as transaction costs are reduced given the smaller distances involved. Given the limited financial and administrative capacity of many African states, effective central government involvement in community-level land management may be untenable. While decentralisation offers a viable response, on a practical level this also means that local level activities may be subject to minimal oversight.

4.2 Disadvantages

4.2.1 Representation

Securing communal tenure requires a body to represent community interests, ideally with legal personality. As discussed, this can range from customary institutions, user groups to elected officials. For any entity purporting to represent a group of diverse individuals, there are significant challenges regarding how to ensure representation is equitable and accounts for all interests. Key questions include how should communities be defined? How should representatives be selected? How do representatives make decisions and ensure the interests of vulnerable groups are protected? Should representative groups be based on democratic elections or if customary institutions are in existence should these be used?

These questions raise complex issues that require detailed analysis and are highly context specific. It is necessary, however, to dispel the myth that communities are homogenous entities. On the contrary, communities consist of varying interest groups, political affiliations and comprise individuals with vastly different priorities. Establishing a truly representative body amongst such

⁶⁹ See Meizen-Dick et al., note 21 above.

⁷⁰ See International Institute of Environment and Development, note 29 above.

⁷¹ See International Institute of Environment and Development, note 54 above.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

diverse positions is an inherently difficult task, especially when the economic value of communal resources in rural areas is factored into the equation. Nevertheless, while the task is a challenging one, the potential benefits of establishing a representative body with secure tenure over communal resources make it worth pursuing.

An issue of central concern is the position of customary land administration institutions. This is particularly the case given the tension between democracy and transparency on the one hand, and the legitimacy and effectiveness of customary institutions on the other.⁷⁵ Customary institutions are rarely inclusive and seldom prioritise the needs of vulnerable groups. A significant body of literature further exists regarding the structural discrimination against women under customary law which is at odds with most states' human rights frameworks.⁷⁶ Several studies have also demonstrated that local authorities have excluded 'outsiders' or recent migrants from access to communal property on the basis that they cannot be considered local and do not fall under customary law.⁷⁷

Despite serious shortcomings, in many circumstances customary institutions are most legitimate and best suited to performing an effective community-level land management role. Across most of rural Sub-Saharan Africa, customary institutions have adapted to changing conditions and have continued to manage communal land, regardless of statutory reform aimed at minimising their role.⁷⁸ Yet in some contexts, customary institutions may no longer be functional, contemporary administrative practices may have marginalised customary practices beyond revival, or the social linkages that bind communal tenure systems together may be broken.⁷⁹ As a result, providing customary institutions with an official role over communal tenure should not be a one-size-fits-all approach. Rather, case by case assessments should be conducted and the most appropriate model for each community selected.

To dismiss customary institutions as unrepresentative and undemocratic fails to appreciate the reality many rural communities face. Across the region, large-scale attempts at land reform have had minimal impact and the state rarely has a legitimate presence in rural areas regarding land affairs. So if it is accepted that customary institutions are generally best placed to manage communal land and resources, then the question remains how can equity and accountability be achieved in undemocratic institutions?⁸⁰ Quota systems can be put in place to guarantee representation of certain vulnerable groups such as women and minorities, however this may not address how decisions are made. More appropriate may be establishing effective oversight measures and linking community-level groups into the broader regulatory framework.

4.2.2 Accountability

Even assuming a representative community body can be established, there are no guarantees that benefits will be equitably distributed or that sound environmental practice will be employed. The unfair exclusion of outsiders, corruption and misappropriation of resources are also possible occurrences.⁸¹ As noted by Cotula, there is a real risk of idealising the local, especially as community institutions may be more prone to abuse of power than central governments given the absence of accountability and oversight mechanisms.⁸² Thus 'elite capture' can occur whereby community elites in charge of land administration can channel benefits from the communal resource to themselves or patrons, while vulnerable groups such as women, minorities and outsiders are marginalised. Indeed, in situations where land distribution is already highly unequal, it is unlikely that local institutions, given past attitudes to vulnerable groups, will prioritise an equitable approach.⁸³ In such circumstances, external governmental officials may be better placed to facilitate more equitable outcomes and broad-based benefit sharing.

In any event, local power dynamics will inevitably play an influential role in community-driven tenure systems.

⁷⁵ See International Institute of Environment and Development, note 54 above.

⁷⁶ G. Mohan and J. Holland, 'Human Rights & Development in Africa: Moral Intrusion or Empowering Opportunity?' 28/88 *Review of African Political Economy* 177 (2001).

⁷⁷ See International Institute of Environment and Development, note 54 above.

⁷⁸ See Bruce and Migot-Adholla, note 13 above.

⁷⁹ See Lane ed, note 24 above.

⁸⁰ *Ibid.*

⁸¹ See International Institute of Environment and Development, note 54 above.

⁸² See Cotula, note 11 above.

⁸³ E. Galasso and E. Ravallion, 'Decentralised Targeting of an Anti-Poverty Program', 89/4 *Journal of Public Economics* 705 (2004).

For example, in parts of Sub-Saharan Africa, customary chiefs are reinterpreting customary powers as full ownership and selling communal land for individual gain at the expense of weaker rural groups.⁸⁴ The state of flux in many customary systems, increasing land values and the added pressure on the commons creates numerous opportunities for abuse. This makes the need for accountability mechanisms and government oversight all the more necessary.

4.2.3 Drivers of Environmental Degradation Not Addressed

Much of the discourse on tenure of the commons has an implicit assumption that communities are the main causes of environmental degradation. External drivers of resource over-exploitation and environmental degradation such as market forces, central government policies promoting foreign investment and a trend towards privatisation, are rarely taken into account. As parts of Sub-Saharan Africa are becoming increasingly integrated into the global economy, external investment can be expected to rise and projected population growth will add even more pressure on the commons. Expecting strengthened communal tenure to address these broader social, political and economic factors is naïve. While this does not discount the benefits of securing communal tenure, it does highlight the role for government in addressing external drivers of environmental degradation and providing a sound regulatory framework for community institutions to operate within.

4.3 One Part of the Solution

Regardless of the overall benefit that a communal rights approach on balance has, it can never be sufficient on its own to achieve community-level sustainable development and environmental protection. While significant benefits flow from secure communal tenure and it can form the foundation of sound environmental management, legal structures alone are never sufficient to change environmental behaviour.⁸⁵ Environmental principles need to be mainstreamed across all areas of governance with social and economic incentives put in place to encourage compliance.⁸⁶ Most importantly, rural

communities need serious engagement and support from government, not only in the development of sound policies but also in terms of long-term collaborative assistance. As the following case study attests, policies aimed at increasing security of communal tenure have faced severe challenges during implementation. Thus similar to past individual titling schemes, while the theory appears sound on paper, if it cannot be translated into a practical, implementable scheme relevant for rural Sub-Saharan Africa, it holds little benefit.

5 CASE STUDY: THE GESTION DE TERROIR APPROACH

5.1 Background

The most established and extensive scheme aimed at achieving sustainable development by focusing on security of communal land rights is the *Gestion de Terroir* (GT) approach in francophone West Africa. The following case study focuses on the implementation of GT in Burkina Faso as its programme is the longest running. Land tenure in Burkina Faso is shaped by increasingly scarce natural resources, environmental degradation and unsustainable patterns of land use.⁸⁷ The ecological differences of degraded land and low rainfall in northern areas, and the increased rainfall and land quality in the south, further shape land relations. This generates significant migrant flows southward seeking work and land.⁸⁸ Population growth and endemic drought since the 1970s have caused added pressures on land already degraded by erosion, desertification, deforestation and the loss of soil fertility.⁸⁹

By the 1980s, the uncertain status of land tenure was recognised as a main obstacle to increased agricultural

⁸⁴ See Cotula, note 11 above.

⁸⁵ See Hesseling, note 32 above.

⁸⁶ See Turner, note 2 above.

⁸⁷ C. Lund, *Land Tenure Disputes and State, Community and Local Law in Burkina Faso* (London: International Institute for Environment and Development, Issue Paper No. 70, 1997).

⁸⁸ See Ouedraogo and Toulmin, note 7 above.

⁸⁹ H. Ouedraogo, *Land Tenure and Rural Development in Burkina Faso: Issues and Strategies* (London: International Institute for Environment and Development, Issue Paper No. 112, 2002).

yields and improved natural resource management. This culminated in the 1984 Law on Agrarian and Land Tenure Reorganisation (RAF) which reinforced state ownership of almost all land and stipulated the central government's role in land distribution. The law aimed to override customary practices but due to poor implementation customary tenure remained intact across rural areas. Community driven land management became favoured policy in the mid-1980s and a national GT model was introduced in 1986. The RAF was later amended in 1991 to allow for the formal establishment of village commissions to control community land.⁹⁰ By 1998 over 40 GT projects were in operation reaching over 2,500 villages and with a combined investment of USD \$280 million.⁹¹ Towards the end of the century, administrative decentralisation took place with rural policies promoting sustainable development, grassroots democracy and environmental protection.⁹²

5.2 Gestion de Terroir in Burkina Faso

The general GT approach in Burkina Faso involves the transfer of management control over communal land (its *terroir* or territory) to local communities.⁹³ This is usually achieved by vesting decision-making powers relating to land management in an ad hoc Village Council. This has resulted in tensions between Village Councils and government land administrators due to the devolution of power.⁹⁴ While some groups do have legal status, most exercise their decision-making powers outside statutory frameworks. Village Councils develop multi-year village land management plans based on current usage, projected needs and environmental degradation.⁹⁵ Projects are then jointly developed to deal with pressing environmental concerns such as erosion and poor soil fertility. Given the GT participatory

approach, implementation is facilitated by project staff who generally spend significant time in target communities and work collaboratively with community members to implement projects.⁹⁶

The GT approach in Burkina Faso has focused on devolving control of land to the community level, however this has generally not included official recognition of communal land rights. While tenure reform is an aspect of many projects, this concerns clarifying existing tenure arrangements more than achieving additional tenure security. Relevant activities have included developing a practical guide on land tenure, knowledge building and drafting a national action plan on tenure reform. An extensive review of the national GT programme in 2008 found that the land tenure activities, amounting to only 4 per cent of project expenditure, had by and large been unsuccessful.⁹⁷ A key recommendation arising from the evaluation was that land tenure issues need to be mainstreamed across all project components as a cross-cutting theme. The GT model in Burkina Faso has therefore placed insufficient emphasis on tenure reform and there is now increased awareness that achieving effective land management at the community level requires major changes to tenure arrangements.

In Burkina Faso, a *terroir* is defined as the smallest administrative unit on the basis of two criteria: it must comprise more than 100 inhabitants or 20 households, and must be at least 5 kilometres from an existing *terroir*. The GT territorial approach is therefore most effective where village land and resources is confined within a distinct spatial unit. However, communal resources and related tenure systems do not always fit into simple territorial units. For example, a newly settled community may not have full tenure over its land, a resource such as a wetland may cover several *terroir*, and seasonal herd movements by mobile pastoralists have unclear spatial elements.⁹⁸

90 See Lund, note 87 above.

91 S. Batterbury, 'Local Environmental Management, Land Degradation and the 'Gestion Des Terroirs' Approach in West Africa: Policies and Pitfalls', 10/1 *Journal of International Development* 541 (1998).

92 See Ouedraogo, note 72 above.

93 See International Institute of Environment and Development, note 29 above.

94 L. Engberg-Pederson, *Creating Local Democratic Politics from Above: The 'Gestion des Terroirs' Approach in Burkina Faso* (London: IIED, Drylands Programme Issue Paper 54, 1995).

95 See Batterbury, note 91 above.

96 See Engberg-Pederson, note 94 above.

97 FIDA, Burkina Faso: Interim Evaluation of Community-based Development Project Phase II, 2008, available at http://www.ifad.org/evaluation/public_html/eksyst/doc/prj/region/pa/burkina/rural.htm.

98 B. Cousins, *Reforming Communal Land Tenure in South Africa – Why Land Titling is Not the Answer: Critical Comments on the Communal Land Rights Bill 2002, 2002*, available at <http://www.plaas.org.za/policy-engagement/communal-land-rights-bill-clrb/CLRB%20-%20Submission%20-%20PLAAS.doc/>.

The use of spatial units over potentially more meaningful social units results in many communal resources being unsuitable for the rigidly prescribed model.⁹⁹

5.3 Critiques

In a detailed field study of GT projects in four villages across Burkina Faso, Engberg-Peterson 1995¹⁰⁰ strongly criticised the programme's focus on establishing new democratically elected Village Councils to conduct land administration. This invariably marginalised and indeed aimed to replace existing customary institutions. The study found Village Councils had been ineffective, held few meetings and had gained only minimal legitimacy. While the appearance of representation may have existed, notification of meetings particularly to women was poor and decision-making remained overwhelming elite-driven. The study found that vulnerable individuals such as the poorest farmers and women would need years of personalised support before they would be willing to participate in democratic structures. Even when present and vocal, community members were often marginalised in decision-making processes.

Ironically, the move for democratic representation runs counter to the participatory, bottom-up approach that the GT model espouses. The study found communities did not seek the proposed resource management changes imposed under GT but acquiesced in order to access project funds. By externally imposing democratic governance over communal resources, the new structures were most likely destined to fail. This paradox leads Batterbury to conclude that GT 'is a second-best form of community development, because it is initially managed from above despite a populist framework and strong local input'.¹⁰¹

Engberg-Peterson further questions whether the dual goals of democratic representation and sustainable resource management can be achieved.¹⁰² If resource management is the goal then support to existing but imperfect customary institutions is the best way forward. These institutions continue to play legitimate land management functions and can be supported to adopt

more equitable approaches. Community-level democratisation, on the other hand, is an inherently political and potentially destabilising process. The establishment of Village Councils should therefore not be prescribed or imposed but should only occur after a thorough community assessment. Despite strong criticism of the GT institutional structure, Engberg-Peterson does acknowledge the scheme has made gains, particularly regarding improved resource management where direct community benefit within a foreseeable time-frame can be demonstrated. Overall, however, if the programme's objectives are to be achieved, the study finds democratisation of village life must be decoupled from natural resource management.

While the GT approach has been praised for facilitating a shift to local control of natural resources and achieved some behaviour change towards more sustainable land management, it has been subject to widespread criticism. The most significant critique in relation to Burkina Faso is that GT schemes have been built on a back drop of tenure insecurity and make minimal, if any, contribution to the complex tenure arrangements.¹⁰³ Second, the sustainability of Village Councils has been questioned as most have no legal status and many have subsided once project funds have ceased. Third, implementation has been significantly hampered by conflict with government agencies over unclear lines of responsibility and a loss of power. Finally, 'outside' or mobile users have in some cases been excluded as they do not reside within the *terroir*.¹⁰⁴

Thus although Burkina Faso has adopted policies that appear sound in the abstract, on implementation the GT approach has been plagued with difficulties. Yet it does still provide several valuable lessons. These include empowering customary institutions rather than imposing local-level democratic models, the realistic expectations that are required when aiming to make resource management more equitable, and the key importance of basing local resource management on secure communal land tenure. Important to also bear in mind is that transferring control over communal resources from the state to communities is a long, complex and painstaking process. It may take generations and have negative short-term consequences before it succeeds.

99 See Batterbury, note 91 above.

100 See Engberg-Peterson, note 94 above.

101 See Batterbury, note 91 above.

102 See Engberg-Peterson, note 94 above.

103 See Hesseling, note 32 above.

104 See Cousins, note 36 above.

6 POLICY IMPLICATIONS

Securing communal land rights to promote sustainable development is not a new approach. While international law on sustainable development has generally failed to recognise the nexus between the two concepts, practitioners have long realised the benefits generated when communities have increased tenure security over land and resources. Yet not just in Burkina Faso, but across Sub-Saharan Africa, theoretically sound policies have either been unworkable in practice or have failed to achieve the intended objectives. The following section analyses why this has occurred and offers recommendations on how to make a communal land rights approach achieve more impact.

6.1 Balance the strengths of local management and centralised oversight

Current best practice places strong emphasis on devolving management responsibility of the commons from central government agencies to the community. Local knowledge and institutions are considered best-placed to identify resource users and develop rules for exploitation. Given the failure of centralised resource management schemes in many rural communities, this approach may merely provide official recognition of the *de facto* situation. Yet in a contemporary context, experience shows that community empowerment is insufficient on its own. Local users generally lack the scientific knowledge necessary to manage resources optimally. Thus without detailed awareness of overall patterns of resource use and restorative capacity, community-level groups may be unable to effectively manage sustainable exploitation.¹⁰⁵ While indigenous knowledge is invaluable and has in many cases served communities well for centuries, given the ever increasing pressure on common resources, contemporary science

may be necessary to ensure long-term sustainable management. State institutions can therefore play a vital role in undertaking environmental impact assessments, providing training and access to technology, as well as performing a general oversight role.

Essentially this requires establishing the optimal level of decentralisation and the appropriate mix of local and state involvement. The exact balance will be highly context specific, however an underlying premise should be to build on existing local capacity wherever possible. Given the complexity of multiple users, added pressures on resource use, and influential external drivers of exploitation, institutional arrangements must link the community into formal state structures in a coherent, complementary manner. A key division of responsibility should be community formulation of local resource management rules, with the state providing approval against established benchmarks. Yet there are also risks involved. This includes undertaking decentralisation too quickly and artificially imposing new structures where existing institutions are in place.¹⁰⁶

By seeking the best of both community and state involvement in communal resource management, there is a risk that additional resources are expended, lines of responsibility become more convoluted, and issues get 'lost' between the different administrative levels. Yet these risks can be mitigated given clearly defined responsibilities and carefully planned procedures. Of central importance is linking the technical assistance and oversight role of government agencies effectively to local institutions. Existing command and control regimes, usually led by state environmental authorities, therefore need to be recalibrated to focus more on supporting community initiatives rather than direct involvement. While this is not a small undertaking, it does present a workable strategy to empower communities through secure tenure while also ensuring environmental agencies provide oversight. In comparison to the oversight vacuum and scientific deficit of a fully localised approach, or the proven failure of centralised models, linking community management into broader environmental management frameworks provides an appropriate middle ground.

¹⁰⁵ T. Williams, *Multiple Uses of Common Pool Resources in Semi-Arid West Africa: A Survey of Existing Practices and Options for Sustainable Resource Management* (London: Overseas Development Institute, Natural Resource Perspectives No. 38, 1998).

¹⁰⁶ See Hesseling, note 32 above.

6.2 Balance the strengths of customary and formal tenure

There can be no doubt that customary land tenure systems remain the most legitimate and relevant for managing the commons. The key issue is therefore how to effectively engage and support customary authorities and thereby increase security of communal tenure. A crucial first step in this regard is addressing the greatest sources of tenure insecurity.¹⁰⁷ This requires reducing the uncertainty generated by statutory regimes and clarifying the legal position of customary communal tenure. By reducing the disconnect between statutory frameworks and the community reality, regulations can better support local management structures.¹⁰⁸ Although simple to state in the abstract, experience shows that dealing with a colonial legacy of legal pluralism and integrating customary tenure into a formal system is fraught with complexity and implementation challenges.

The benefits of community empowerment, meaningful participation, and incentives for sustainable management that secure communal tenure offers, makes it a goal worth pursuing. The question is how to make communal tenure more secure while avoiding the negative results that many formal titling projects have generated. To improve implementation efforts, Bruce (1993)¹⁰⁹ has raised an important conceptual distinction: shifting from a replacement paradigm to an adaptation paradigm. The latter represents a gradualist or incremental approach to achieving increased formal recognition of customary tenure. Thus rather than large-scale, compulsory and systematic titling programs, the state should facilitate evolutionary strengthening of customary law by establishing an enabling legal and administrative environment.¹¹⁰ On a practical level, this requires formal recognition of the legal applicability and enforceability of customary rights and possibly restricting formal titling efforts to clearly defined high-value areas.

Community-based solutions to strengthen customary tenure must also be explored.¹¹¹ While the range of

possible interventions varies significantly depending on resource type and locality, options include a contractual co-management approach, engaging with local elites to improve tenure security of vulnerable groups in a social sense, and strengthening assignment and transfer procedures through the use of written agreements. Overall, a holistic approach to strengthening tenure security is required.

6.3 Appreciate the social and political nature of land tenure reform

A central short-coming of previous efforts to strengthen communal land rights has been insufficient awareness of the inherently social and political nature of the process. Any attempt to transfer control of land from the state to communities, thereby reducing the power of state institutions, will be met with political resistance. In most Sub-Saharan African contexts, state ownership and control of rural areas has been a foundational land tenure principle since independence. Changing this dynamic represents an implicit challenge to state authority. On the community level, even the best attempts to improve security of tenure will inevitably result in winners and losers. Formalisation of customary tenure changes the status quo and may result in elites having less control and being subject to more scrutiny; moves that will be resisted.¹¹² Reforms may therefore face resistance both from above, in terms of state institutions unwilling to cede control, and also from below, with customary authorities opposed to broader engagement with the state.

To deal with these intrinsic complexities, a sociological approach to tenure reform is required. This must take account of local political dynamics, social and cultural norms, as well as the specific characteristics of the communal resource.¹¹³ In this light, prescribing uniform, centrally driven change cannot be effective. Indeed, the instrumental and positivist approach taken by many governments across Sub-Saharan Africa has by and large failed. Any statutory change only forms one part of the complex web of relations that is communal land tenure.

Given the intensely political nature of land tenure reform, interventions must explicitly confront questions

¹⁰⁷ See Meizen-Dick et al., note 21 above.

¹⁰⁸ See Hesselting, note 32 above.

¹⁰⁹ See Bruce, note 13 above.

¹¹⁰ See International Institute of Environment and Development, note 54 above.

¹¹¹ *Ibid.*

¹¹² See Meizen-Dick et al., note 21 above.

¹¹³ See Hesselting, note 32 above.

of interest and the distribution of benefits. Ensuring that there are appropriate incentives for social agents to participate may therefore be more important than the intention of the intervention itself.¹¹⁴ The mobilisation of political support through advocacy and political engagement at both the national and community level could further prove essential to seeing reforms succeed. In light of the political and social obstacles to change, perhaps reform efforts aimed at securing communal tenure should have more realistic objectives and time frames. One approach could be to focus on building an enabling environment for increased community control over the commons and postpone more sweeping tenure reforms until a conducive political environment exists.

6.4 Policies must be practicable and adapted for local contexts

To achieve the benefits of securing communal title, the policy objective must be transforming tenure security from an abstract notion on paper into officially recognised rights of access and control. As discussed, the state's role in achieving this end should be providing an enabling legal framework as well as technical and scientific support to local institutions. Given that management of communal resources is generally subject to multiple and often contradictory legal systems and rules – state and provincial regulations, customary law, as well as project related access rules – reform efforts should prioritise policies that streamline and simplify existing arrangements.

On a practical level, this requires serious reform of state institutions. Civil servants need retraining to become advisors and facilitators that work collaboratively with local authorities rather than employing command and control techniques.¹¹⁵ This equates to a major mindset shift, the significance of which should not be underestimated. However, well-executed training programmes for land and environment officers represent a practicable approach to complement tenure reform. This should further be implemented in conjunction with training for community authorities on the technical aspects of land and resource management. Trust-building on both sides should also be prioritised so state authorities can gain confidence in community-level

management capabilities and communities can overcome distrust of state intervention.¹¹⁶

Perhaps most important in achieving increased security of communal tenure is recognising the diversity of contexts to which general policies apply. The nature of resources, number of user groups, and nature of local tenure systems all differ dramatically within a single country. General policy prescriptions therefore have inherent risks and there can be no effective one-size-fits-all solution. However, guiding principles can be beneficial in creating the enabling environment for increased security of communal tenure to occur. This requires playing to the strengths of both central authorities and local communities, linking community management structures into existing regulatory frameworks and adapting the model for each context. Such an approach offers benefits in managing the complex pressures on the commons, limiting current environmental degradation and achieving sustainable patterns of use.

7 CONCLUSION

This paper has analysed the benefits that increased security of communal tenure can provide in improving resource management and achieving rural sustainable development in Sub-Saharan Africa. Most importantly, secure rights over the commons can provide a foundation for community empowerment and participation in environmental decision-making, while also putting in place incentives for sustainable resource management. Yet attempts to put this theory into practice have generally proved unsuccessful. Key reasons are the political barriers to transferring control of the commons from the state to communities, the legal pluralism that leaves tenure over the commons unclear and insecure, and administrative decentralisation which has marginalised the state's oversight role over community institutions. Options to improve implementation have further been explored. These include building on existing customary institutions,

114. See Cousins, note 36 above.

115. See Hilhorst and Arnink, note 25 above.

116. *Ibid.*

adopting a more sociological approach to tenure reform, not undertaking prescriptive, uniform interventions but linking locally specific resource management regimes into the broader regulatory framework.

The true tragedy of the commons is that despite their vital role in rural development, these common resources are often trapped between dysfunctional land legislation that vests ownership in the state and unrecognised communal tenure administered by customary authorities. Efforts to clarify tenure arrangements and improve security of tenure, while grounded in a sound theoretical approach, have failed to achieve the intended impact. This situation has led to *de facto* open access regimes that allow unsustainable resource depletion and land degradation.

Given the pressures of projected population growth, increased resource demand and a trend towards privatisation of communal land, the commons are under increasing threat. Unclear and ineffective tenure arrangements only exacerbate the situation. Practical solutions are therefore needed now more than ever. This paper advocates for empowering communities to manage the commons through secure tenure and mandating state agencies to build the effectiveness and accountability of local institutions. If the implementation issues can be overcome, increasing security of communal tenure can provide a basis for more sustainable management of the commons and offers hope that the sustainable development promised under international law can be more than just rhetorical. While secure tenure over common resources can only be one part of the solution, for communities in Sub-Saharan Africa it has the potential to have a transformative effect.

*LEAD Journal (Law, Environment and Development Journal) is jointly managed by the
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